

# Dispute Resolution Techniques and Public Sector Collective Bargaining

## I. INTRODUCTION

In the latter half of the 1980s, all but five states<sup>1</sup> have enacted some form of public sector collective bargaining statute. As many as twenty-nine states have passed statutes authorizing bargaining for public employees in the short period since 1970.<sup>2</sup> Public sector collective bargaining is a relatively new field and states have been both creative and diverse in the development of laws relating to the area.

A possible explanation for this legislative variety relates to the unique problems that arise in public sector as opposed to private sector collective bargaining. For example, in the public sector the government has the dual role of sovereign and manager in the bargaining process, the result being that the interests may and do conflict.<sup>3</sup> The public sector work force and the nature of the services provided are also generally different from that found in the private sector.<sup>4</sup> There is a higher percentage of "professionals" in the public sector, and the services provided are frequently geared to public health and welfare with the government being the sole provider of a service in many cases. This difference affects how states have dealt with the right to strike issue. Profit motive is another key ingredient in private sector collective bargaining that does not exist in the public sector.<sup>5</sup>

To states attempting to develop comprehensive collective bargaining, the National Labor Relations Act (NLRA),<sup>6</sup> which governs private sector labor relations, has provided an obvious model. Because of the differences in the public and private sectors, however, many variations have evolved. Despite these variations, the existing legislation appears to have three overriding goals.<sup>7</sup> The first goal is to avoid strikes by public employees, particularly in critical health and safety areas. The second goal is to replace actual strikes with strike-like incentives in an effort to maintain a balance of bargaining power. The third and most important goal is to retain the benefits of free collective bargaining where the parties negotiate their own agreement in recognition of the fact that the best

---

1. Arkansas, Mississippi, North Carolina, South Carolina, and West Virginia. 1 PUB. EMPLOYEE BARGAINING REP. (CCH) 400-451.

2. *Id.*

3. P. PRASOW & E. PETERS, ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS, 235-36 (1970).

4. Note, *The Scope of Negotiations Under the Iowa Public Employment Relations Act*, 63 IOWA L. REV. 649, 656 (1978).

5. *Id.* at 655.

6. National Labor Relations Act, 29 U.S.C. §§ 141-87 (1976).

7. Meagher, *New Frontiers in Dispute Resolution: Skills and Techniques*, in NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION: A REPORT OF THE 23rd CONFERENCE OF THE ASSOCIATION OF LABOR MEDIATION AGENCIES AND THE 2nd CONFERENCE OF PROFESSIONALS IN DISPUTE RESOLUTION 178 (Anderson ed. 1976).

agreement is usually one achieved voluntarily by the parties.

To accomplish these goals, states have incorporated three primary dispute resolution techniques into the bargaining process which are mediation, fact-finding, and interest arbitration.<sup>8</sup> Much attention has been given to general reviews of these techniques, but much less attention has been given to some of the variations states have utilized and some of the extrinsic factors that may influence the success of the three techniques. The purpose of this Note is to step beyond an overview of the primary techniques and to evaluate and explore how these variations and extrinsic factors impact the utility and effectiveness of the techniques. The majority of the variations and factors discussed here are statutory, rather than environmental factors such as political climate or the state of the economy. The Note will also include a review of the Ohio Collective Bargaining Law for Public Employees, which became law in 1984,<sup>9</sup> and provides an excellent example of how the utility and effectiveness of a dispute resolution technique are impacted by the legislature's choice of both configuration and structure of the available techniques.

## II. MEDIATION, FACT-FINDING, AND ARBITRATION: AN OVERVIEW

To understand how variations and extrinsic factors impact the use of primary dispute resolution techniques, it is imperative to briefly review the techniques themselves. Mediation, the most commonly utilized of the three techniques,<sup>10</sup> employs a knowledgeable, neutral third party to facilitate an agreement between the public employer and the employee representative.<sup>11</sup> Mediation combines at least six procedural, communicative, and substantive functions: (1) educating the parties relative to the bargaining process; (2) helping the parties gain a better understanding of the other's position; (3) helping the parties reduce hostility by developing objectivity; (4) providing a format for problem resolution during mediation for the parties to utilize when additional problems arise; (5) presenting additional alternatives to the parties that may keep them at the bargaining table; and (6) providing alternatives that individual parties would be unable to advance without losing face and which may assist the parties in making concessions.<sup>12</sup> Mediation is often statutorily mandated prior to use of other techniques and is considered part of the

---

8. See 1 PUB. EMPLOYEE BARGAINING REP. (CCH) 4000.

9. OHIO REV. CODE ANN. §§ 4117.14 (Page Supp. 1983).

10. Kruger and Jones, *Compulsory Interest Arbitration in the Public Sector: An Overview*, 10 J. COLLECTIVE NEG. 355, 356 (1981).

11. Kochan, *Dynamics of Dispute Resolution in the Public Sector*, in PUBLIC SECTOR BARGAINING 179 (B. Aaron, J. Grodin, and J. Stern eds. 1979).

12. Perez, *Dispute Resolution Procedures in Public Employee Bargaining*, 17 URB. LAW 199, 210-11 (1985).

collective bargaining process, but not a substitute for that process. Parties continue to have a duty to bargain outside the mediation process.<sup>13</sup>

Fact-finding is frequently the middle step between mediation and binding interest arbitration and incorporates some of the functions and rationales of each. Fact-finding involves a neutral third party or panel that hears evidence on the respective positions of both parties in an adversarial hearing and then makes recommendations based on the evidence.<sup>14</sup> The recommendations may be published for public consumption depending on the statute.<sup>15</sup> When fact-finding is not binding, either statutorily or functionally, the publication process places public pressure on the parties to either reach agreement or accept the fact-finder's recommendation.<sup>16</sup> Fact-finding forces parties to clarify their positions in concrete terms, enables parties to discover which issues are most important to their opponent, narrows the issues for arbitration if settlement is not reached,<sup>17</sup> places public pressure on the parties to adopt the fact-finder's recommendation, and provides one more opportunity for the parties to move toward resolution and possibly voluntary settlement.<sup>18</sup>

The two kinds of fact-finding that have been identified are the advisory arbitration model and the super-mediation model. The advisory arbitration model resembles interest arbitration without a binding recommendation and utilizes a quasi-judicial procedure when there is limited contact between the fact-finder and the parties.<sup>19</sup> The super-mediation model, on the other hand, is a more informal process and allows the fact-finder to revert to mediation and actively participate in the process.<sup>20</sup>

Two criticisms of fact-finding are that it inhibits the parties from presenting final offers because they anticipate the fact-finding process,<sup>21</sup> and that it duplicates what takes place at arbitration.<sup>22</sup> The parties may fail to bargain with realistic final offers and instead rely upon the fact-finder to dictate the terms of an agreement in hopes that it will be

13. *Id.* at 211.

14. Bierman, *Fact-finding: Finding the Public Interest*, 9 RUT.-CAM. L.J. 667, 668 (1978).

15. C. RHYNE & R. DRUMMER, *THE LAW OF MUNICIPAL LABOR RELATIONS* 171-72 (1979).

16. *Id.* at 172.

17. Lund, *Impasse Resolution Under the Iowa Public Employment Relations Act: A Defense of Fact-Finding*, 30 DRAKE L. REV. 561, 578-79 (1980-81).

18. Perez, *supra* note 12, at 214.

19. Gerhart & Drotning, *Is Fact-finding Useful in the Public Sector?*, 10 J. COLLECTIVE NEG. 279, 280-82 (1981).

20. C. RHYNE & R. DRUMMER, *supra* note 15, at 172. The use of mediation as part of the fact-finding process is the critical variation in the two models and will be discussed more thoroughly later.

21. *Id.* at 174.

22. Gerhart & Drotning, *supra* note 19, at 284.

more favorable and will prevent humiliation when concessions must be made to reach a voluntary agreement. Fact-finding and arbitration may be duplicative in several ways including the nature and scope of the proceeding, the parties presentation of their respective positions, the issuance of a written decision, and the criteria utilized by the neutral third party<sup>23</sup>

Prior to discussing interest arbitration, it is helpful to define some important terms. "Interest arbitration" involves determination of substantive terms of a new contract, while "grievance arbitration" involves disputes over terms in an existing contract.<sup>24</sup> If a legally binding contract award results, then it is called "binding interest arbitration."<sup>25</sup>

Arbitration is considered more effective than mediation or fact-finding in preventing strikes, and there is evidence showing that strikes occur far less frequently when arbitration is statutorily mandated.<sup>26</sup> A possible explanation is that interest arbitration has "strike-like" characteristics. If an arbitrator is favorable to the union, public employees are provided with a level of bargaining power they do not inherently possess, and the potential losses to an employer are similar to those a strike might have imposed. Hence, interest arbitration is more favorable to the public employee than the public employer.<sup>27</sup>

Two distinctly different kinds of interest arbitration are conventional arbitration and final offer arbitration. Of those jurisdictions employing arbitration, a majority utilize conventional arbitration.<sup>28</sup> Theoretically, the arbitrator or arbitration panel, after hearing evidence from both sides, issues a decision based on either statutory standards or the standards that have evolved through arbitration of public sector labor disputes generally. In reality, the arbitrator has immense discretion and is free to shape a decision based on a personal evaluation of the situation. In conventional arbitration, the arbitrator is not limited to the final offers of the parties or the fact-finder's recommendation.

There are three major criticisms of conventional arbitration. First, it

23. Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 966 (1969).

24. Sepowitz, *Final Offer Arbitration: The Last Word in Public Sector Labor Disputes*, 10 COL. J. OF LAW AND SOC. PROBLEMS 525 (1974).

25. *Id.*

26. Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, INDUS. & LAB. REL. REV. 64, 65 (1979) (derived from Hoyt N. Wheeler, *An Analysis of Fire Fighter Strikes*, 26 LAB. L.J., 17-20 (January 1975)); J. LOWENBERG, W. GERSHENFELD, H. GLASBECK, B. HEPPLER & K. WALKER, *COMPULSORY ARBITRATION* 165 (Lexington, Mass. D.C. Heath, 1976); J. TERN, C. REHMUS, J. LOWENBERG, H. KASPER & B. DENNIS, *FINAL-OFFER ARBITRATION* 189 (Lexington, Mass. D.C. Heath, 1975); P. Feuille, *Final-Offer Arbitration*, PUBLIC EMPLOYEE RELATIONS LIBRARY SERIES No. 50, 10-11 (Chicago: International Personnel Management Association, 1975).

27. Sepowitz, *supra* note 24, at 526.

28. 1 PUB. EMPLOYEE BARGAINING REP (CCH) 400-451.

may have a "chilling effect" on the parties by preventing them from bargaining in good faith. Because arbitrators frequently "split the difference" between the parties' positions, there is hope that an arbitration agreement will be more beneficial than making concessions at the bargaining table. Second, it produces a "narcotic effect" on the parties by making them dependent on the arbitration process rather than participating in independent collective bargaining. Finally, there is often a "flip-flop" effect where the arbitrator holds for one party on an issue at one proceeding and for the other party on the same issue in a successive proceeding.<sup>29</sup>

Final offer arbitration, the second type of interest arbitration, has become increasingly popular in recent years because it eliminates some of the negative effects that conventional arbitration has on the bargaining process.<sup>30</sup> Each party submits to the arbitrator a final offer on all disputed issues, and the arbitrator must decide on one of the two offers.<sup>31</sup> Because of the potential cost to the losing party, final offer arbitration provides a strong incentive for the parties to reach a voluntary agreement prior to arbitration.<sup>32</sup> It also forces the parties who do reach arbitration to present more reasonable offers.<sup>33</sup> Another benefit is that the arbitrator is not granted undue discretion since the parties control the content of their final offers.<sup>34</sup> On the other hand, a problem with final offer arbitration is the potential for unfair results that might be prevented if the arbitrator had more flexibility to shape a decision based on the circumstances.<sup>35</sup> There are variations that may provide the arbitrator with additional flexibility

### III. VARIATIONS OF THE TRADITIONAL TECHNIQUES

States have not simply taken the traditional dispute resolution techniques, either singularly or in a particular combination, and uniformly implemented them. In an effort to design an effective framework for collective bargaining in the public sector, states have used these techniques in a variety of combinations and have also varied the use of individual techniques. The following discusses some of the variations that have evolved and the implications for success on the respective dispute resolution procedures.

---

29. Kruger & Jones, *supra* note 10, at 359.

30. C. RHYNE & R. DRUMMER, *supra* note 15, at 176.

31. *Id.* at 177.

32. Gallagher, *The Use of Interest Arbitration in the Public Sector*, 33 LAB. L.J. 501, 505 (1982).

33. Sepowitz, *supra* note 24, at 528.

34. J. GRODIN, D. WOLLET & R. ALLEYNE, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT*, Unit 4, 276 (1979).

35. Sepowitz, *supra* note 24, at 530-31.

### A. Mediation

Mediation is the most widely used dispute resolution technique in public sector bargaining<sup>36</sup> and is utilized more frequently in the public sector than the private sector. In Iowa, only about 15% of private sector contracts are reached with the help of mediation, but as many as 62% to 72% of public sector contracts are concluded with mediation as part of the process.<sup>37</sup> Mediation is frequently the first step in the dispute resolution process, but it may also be utilized at a variety of different points during the process.<sup>38</sup> The goal of interjecting mediation at a variety of locations in the process is to provide the parties with as many opportunities and incentives to reach their own agreement as possible.

Mediation may or may not be statutorily mandated, but even when mandated, mediation is the least coercive of the three procedures. When mediation is mandatory, failure to participate is construed as a failure to bargain in good faith and results in an unfair labor practice charge. An unfair labor practice proceeding has the potential not only to delay an agreement, but the proceeding may push the parties farther apart and prevent an agreement. The rule as to whether an impasse must be reached on every bargaining item before mediation can be implemented also differs among states. At least one state has held that insisting on bargaining to impasse on a non-mandatory subject is an unfair labor practice in the public sector context.<sup>39</sup>

These variations in mediation technique can change the parties' expectations of the process and create a different result. For example, if mediation is merely the first step in the process, it may be viewed as a waste of time, or at best, an opportunity to discover the other side's position and a way to narrow the issues for fact-finding or arbitration.<sup>40</sup> In some states, the goal of mediation may be to narrow the issues. In other jurisdictions, the goal of mediation is to break the impasse and reach an agreement. In reality, mediation often services both goals.<sup>41</sup>

### B. Fact-Finding

The issue of whether fact-finding is a viable and beneficial technique

---

36. 1 PUB. EMPLOYEE BARGAINING REP. (CCH) 400-451.

37. Phillips, *Impasse Resolution in Public Sector Collective Bargaining: The Need to Reevaluate Options*, 28 DRAKE L. REV. 547, 549 (1978-1979).

38. Meagher, *supra* note 7, at 178.

39. *Uniformed Firefighters Ass'n, Local 107 v. City of Mount Vernon*, [Dec. 1977 - May 1980 Transfer Binder, Adm. Rul.] PUB. EMPLOYEE BARGAINING REP. (CCH) 40,768 (N.Y.P.E.R.B. Nov. 9, 1978).

40. Meagher, *supra* note 7, at 178.

41. *Id.*

to be utilized in public sector collective bargaining is the source of much controversy. There is not only disagreement about what should be expected of the procedure, but also when and how fact-finding should be available to the parties. Some commentators believe fact-finding is redundant and should be eliminated because it is too costly in both time and money, while others believe it is the most critical and pivotal point in the negotiation process and must be retained.<sup>42</sup>

The most noteworthy variation of the fact-finding process does not concern the technique itself, but how this procedural stage fits within the total process. Fact-finding is considered less valuable when it is totally advisory in nature, although it does serve the function of helping the parties narrow the issues for possible arbitration. It also provides one more opportunity for the parties to reach voluntary agreement.<sup>43</sup> Fact-finding is most valuable when followed by final offer arbitration that includes the fact-finder's recommendation as one of the options. In this configuration, the fact-finder's recommendation will frequently become the arbitrator's decision. Awareness that the fact-finder's decision may become binding forces the parties to reach a voluntary settlement at an earlier point in the process if they wish to avoid an imposed resolution. If the fact-finder also functions as a mediator, a mediated settlement is more likely at this juncture.<sup>44</sup> Thus, this fact-finding model consists of a voluntary agreement achieved with the assistance of a neutral third party.

Another fact-finding model suggests the mediator be allowed the option of recommending fact-finding only when it is warranted, instead of requiring fact-finding as a mandatory step in the process. The mediator could recommend fact-finding when the parties have a great deal of distance between them, and fact-finding might help bring them closer together and "buy" time for a voluntary agreement.<sup>45</sup>

Two other variations of the fact-finding model deserve mention. First, various jurisdictions have different consequences following fact-finding that clearly have the potential to influence the total process. It has already been mentioned that fact-finding followed by final offer arbitration has some important benefits. Fact-finding followed by conventional arbitration receives criticism for being redundant due to the commonality in the procedures.<sup>46</sup> When fact-finding is the final dispute resolution procedure in the process without arbitration as a subsequent option, some jurisdictions have devised statutory consequences to enhance the process' ability to either encourage voluntary settlement or to dis-

---

42. Lund, *supra* note 17, at 564-73.

43. *Id.*

44. *Id.*

45. *Id.*

46. See *supra* text accompanying note 26.

courage the parties from a work stoppage. Several states require legislative intervention following the process.<sup>47</sup> Florida, for example, requires that the legislature settle the dispute if the fact-finder's recommendation is rejected by the parties. Ohio requires a three-fifths vote of the membership of the legislature or the employee organization for the respective parties to reject the fact-finder's opinion.

The second variation involves preventing the fact-finding process from being overused and from having a chilling effect on negotiations. One method is to make the parties pay more for the process, but not so much that it becomes impractical and ceases to be a strike prevention technique.<sup>48</sup> Another method is to require both an agency determination that a bona fide impasse exists, and a written justification for the impasse before proceeding to fact-finding.<sup>49</sup> These legislated obstacles are designed to limit access to the fact-finding process and to prevent the parties from automatically deferring serious bargaining in anticipation of the process.

### C. Interest Arbitration

When analyzing variations among interest arbitration procedures it is important to remember that the primary purpose of arbitration is to provide a workable and acceptable mechanism for resolving the disputed issues between the parties that approximates the agreement the parties would have reached voluntarily while avoiding a work stoppage.<sup>50</sup> It is also important to note that generally, third-party determination of contract terms benefits labor more than management, although the impact may differ depending on which model is used.<sup>51</sup> As noted earlier, the two kinds of interest arbitration are conventional and final offer.<sup>52</sup> There are five variations that apply to both types of interest arbitration. There are also a number of variations that apply only to final offer arbitration.

The first variation that applies to both kinds of interest arbitration involves the issue of compulsion. Not all states that utilize arbitration as a technique mandate arbitration. It may be entirely optional, it may be mandatory for certain classifications of employees, such as essential

---

47. FLA. STAT. ANN. § 447.403(4) (West 1981); OHIO REV. CODE ANN. § 4117.14(C)(6) (Page Supp. 1983).

48. Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

49. CONN. GEN. STAT. ANN. § 7-473(a) (West Supp. 1969).

50. J. STERN, C. REHMUS, J. LOWENBERG, H. KASPER & B. DENNIS, FINAL-OFFER ARBITRATION 281 (1975) [hereinafter STERN].

51. Hogler and Kriksciun, *Impasse Resolution in Public Sector Collective Negotiations: A Proposed Procedure*, 6 INDUS. REL. L.J. 481, 487 (1984).

52. See *supra* text accompanying notes 29-35.



public safety employees, or it may be mandatory for all employees.<sup>53</sup> Jurisdictions that have non-compulsory arbitration usually have some other mechanism to resolve disputes. For example, the legislature may be empowered to settle a dispute when the parties fail to reach an agreement after fact-finding.<sup>54</sup>

A second variation among state statutes is the incorporation of a specific list of criteria for the arbitrator to consider when making a decision. Although statutes vary, criteria given the most importance are comparability, ability to pay, and the cost of living.<sup>55</sup> It is unclear whether these statutory criteria actually affect the arbitrator's decision. Other factors that may impact an arbitrator's decision include, but are not limited to, personality, skill level, prior arbitration between the parties, and the dispute resolution procedures which have preceded the arbitration. New Jersey arbitrators indicated that the lack of quality evidence made reliance on statutory criteria difficult and forced them to use their own common sense.<sup>56</sup> Since arbitrators are not required to provide extensive justification for their decisions, it is impossible to know if the use of criteria is an important factor.

A third variation applicable to both types of interest arbitration concerns the subjects that may be submitted to arbitration. Submission of non-mandatory subjects to arbitration has frequently been found to be an unfair labor practice.<sup>57</sup> If permissive subjects were allowed to be submitted, the process would be much more cumbersome and expensive.

A hybrid technique, known as mediation-arbitration or med-arb, is the fourth variation. Sometimes called "mediation with muscle" or "mediation with a club," med-arb combines the techniques of mediation and arbitration in the same step and sometimes utilizes the same third-party intervenor. The technique involves an arbitrator who attempts to mediate a settlement if possible, while retaining the authority to make a binding decision on those issues that remain unsettled.<sup>58</sup> Benefits of this technique are that the parties still have the opportunity and incentive

53. Gilroy & Sinicropi, *Dispute Settlement in the Public Sector: The State of the Art Report to Department of Labor, Division of Public Employment Relations Services*, in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 783 (Smith, Edwards & Clark eds. 1974).

54. See *supra* text accompanying note 47.

55. Weitzman & Stochaj, *Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey*, 35 *ARB. J.* 25, 26 (Mar. 1980). Comparability or "the going rate" is said to be the controlling factor in most arbitrator's decisions.

56. *Id.*

57. *Id.*

58. Kagel, *Comment* 185, 186, in *A REPORT TO THE 23RD CONFERENCE OF THE ASSOCIATION OF LABOR MEDIATION AGENCIES AND THE 2ND CONFERENCE OF THE SOCIETY OF PROFESSIONALS OF DISPUTE RESOLUTION* (Anderson ed. 1976). See also Weitzman & Stochaj, *supra* note 55, at 27; Ross, *The Med-Arb Process in Labor Agreement Negotiations* (SPIDR Committee on Research and Education, Occasional Paper No. 824, Feb. 1982).

to reach a voluntary settlement and the arbitrator has a better grasp of the parties' actual bargaining positions if forced to make a final decision.<sup>59</sup>

There are several criticisms of the med-arb process. Within a final offer arbitration context, it is contended that because the parties can continually modify their final offers, the "fear" that encourages the parties to agree short of arbitration will not be as great, and reduces the parties' incentive to seriously negotiate prior to arbitration.<sup>60</sup> A controversial practice in the med-arb arena is to incorporate voluntarily mediated agreements into the arbitration decision. This disguises the fact that the parties have actually made concessions and allows the negotiators to save face.<sup>61</sup> Another concern frequently noted is that to effectively combine the two techniques, special skills are required in two areas that not all arbitrators possess. Therefore, the ultimate success of med-arb may depend upon the skills of the individual arbitrator.<sup>62</sup>

A fifth variation involving both kinds of interest arbitration concerns the finality of the award. Statutes often treat economic issues differently than policy issues, but some even treat the arbitrator's decision on each type of issue differently. In some statutes the decision on a policy issue may be only advisory, whereas the decision on an economic issue is final. For example, in Maine, the arbitrator's decision is final for all issues except wages, pensions and insurance. The decision for these issues is merely advisory.<sup>63</sup> In Pennsylvania, an award is binding unless enabling legislation is required, which would include budget legislation for economic issues.<sup>64</sup> In other jurisdictions, final offer arbitration applies to economic issues.<sup>65</sup> Any other findings relative to policy are of an advisory nature.

Final offer arbitration has been heralded as a highly effective way of "encouraging" the parties to voluntarily agree based on their fear of a substantial loss if the other party's final offer is selected. Two major variations of final-offer arbitration tend to mitigate the "all or nothing" stakes. Official offer arbitration, a relatively new procedure currently utilized in Iowa and Massachusetts, provides for including the fact-finder's recommendation as one of the options the arbitrator may choose from when making a final decision.<sup>66</sup> This variation's impact is to make the fact-finding process much more critical because, in a majority of

---

59. *Id.* at 187.

60. Gallagher, *supra* note 32, at 505.

61. Meagher, *supra* note 7, at 169.

62. *Id.*

63. ME. REV. STAT. ANN. tit. 26, § 979-D(4)(D) (1974).

64. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1987).

65. J. GRODIN, D. WOLLETT & R. ALLEYNE, *supra* note 34, at 281.

66. Rehmus, *Varieties of Final Offer Arbitration*, 37 ARB. J. 4, 5-6 (1982).

cases, the fact-finder's recommendation becomes the arbitration decision. A resulting criticism is that the arbitration hearing then becomes redundant.<sup>67</sup> Another criticism of final-offer arbitration is that it forces the arbitrator to select the lesser of two evils when both final offers are unrealistic. The inclusion of the fact-finder's recommendation as a potential option may prevent unreasonable decisions, but it may also provide the arbitrator with an easy decision and discourage the parties from presenting realistic offers.<sup>68</sup> The parties remain free to make offers based on political considerations knowing that the fact-finder's report is another option.

Another variation that prevents the possible draconian results of final offer arbitration is known as "issue-by-issue" arbitration, as opposed to arbitration of the "total package." Issue-by-issue arbitration involves the arbitrator making a decision on each individual issue submitted for arbitration. "Total package" arbitration produces a single decision on the entire package of issues presented by each party. There are two problems that arise in total package arbitration. First, the arbitrator's choice between two, and possibly three options allows little opportunity for the arbitrator to apply appropriate statutory or common law standards. Second, the arbitrator may be forced to render an unrealistic decision if the parties have submitted unreasonable final offers.<sup>69</sup> It is possible that issue-by-issue arbitration will produce a more equitable decision, but there are many criticisms of this variation. It should be noted that one of the primary goals of final offer arbitration is to encourage the parties to reach their own agreement, not reach the most equitable one.<sup>70</sup> The issue-by-issue procedure may discourage the parties from narrowing the issues, and leave many political and low priority items on the table wasting time and money.<sup>71</sup> It may also interfere with a party's flexibility on a particular issue if the party feels the issue is a bargaining chip for later use when bargaining on another issue.<sup>72</sup> The items in many proposals are dependent upon one another and not separable for all practical purposes.<sup>73</sup> In some jurisdictions only economic issues are submitted for issue-by-issue determination and among jurisdictions there is inconsistency concerning what constitutes an economic issue.<sup>74</sup> Research of the issue-by-issue system in Michigan shows that it

---

67. *Id.* at 6.

68. Meagher, *supra* note 7, at 169.

69. Anderson, MacDonald & O'Reilly, *Impasse Resolution in Public Sector Collective Bargaining — An Examination of Compulsory Interest Arbitration in New York*, 51 ST. JOHN'S L. REV. 453, 496 (1977).

70. J. GRODIN, D. WOLLETT & R. ALLEYNE, *supra* note 34, at 278-79.

71. *Id.* at 279.

72. Anderson, MacDonald & O'Reilly, *supra* note 69, at 498.

73. Zack, *Final Offer Selection — Panacea or Pandora's Box?*, 19 N.Y.L.F. 567, 579 (1974).

74. STERN, *supra* note 50, at 499.

has failed to reduce the number of cases that reach arbitration or the number of issues that are presented there.<sup>75</sup>

In Eugene, Oregon, another modified version of final offer arbitration has been implemented to soften the "all or nothing" consequences. Each party submits two final offer packages which provide the arbitrator with four options rather than two. This allows the parties more flexibility in structuring their offers, but it also increases the uncertainty for both parties regarding the arbitrator's final decision.<sup>76</sup>

When the final offer actually becomes "final" also varies among jurisdictions. The options range from allowing the parties to continue revisions of their final offer through the close of the arbitration hearing, to requiring the submission of the final offer on the table when impasse occurs. The former may tend to dilute the pressure to reach voluntary agreement prior to arbitration.<sup>77</sup> The latter substantially increases the risk of proceeding to arbitration and provides the parties with increased incentive to avoid impasse and to reach their own agreement.<sup>78</sup>

#### IV EXTRINSIC FACTORS IMPACTING THE PROCESS

A variety of procedural issues extrinsic to the actual techniques and variations discussed above require consideration when evaluating dispute resolution procedures in public sector collective bargaining. As stated earlier, the focus here is on statutory variations rather than outside variables that impact the process.

Although it has nothing to do with the success of an individual procedure or combination of procedures, a factor that influences the ability of the parties to reach resolution is whether there is an option to by-pass the statutory process by mutually agreeing to an alternative dispute resolution procedure.<sup>79</sup> In jurisdictions utilizing this option, a large percentage of parties find it preferable to substitute their own methods of dispute resolution for the statutory process. As discussed below,<sup>80</sup> Ohio has implemented this feature and provides a suggested list of alternatives.<sup>81</sup> This legislative option avoids the cost of consuming limited government resources to resolve disputes. If the parties have

---

75. J. GRODIN, D. WOLLETT & R. ALLEYNE, *supra* note 34, at 281.

76. Long & Feuille, *Final Arbitration: "Sudden Death" in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 198 (1973-74). This flexibility is particularly helpful in multi-issue negotiations. It may also permit the parties to make one offer that is politically acceptable to their constituents and one offer that is more realistic.

77. Feuille, *Final Offer Arbitration and Negotiating Incentives*, 32 ARB. J. 203, 217 (1977).

78. *Id.*

79. *Id.* at 214.

80. *See infra* text accompanying note 101.

81. OHIO REV. CODE ANN. § 4117.14(C)(1) (Page Supp. 1983).

negotiated the procedure, they will also be more likely to have an investment in the success of the procedure.

Perhaps the most obvious and important factor impacting the utility and effectiveness of various dispute resolution techniques is how they are used in combination and in what configuration. For example, if mediation continues to be an option throughout the process, even during the implementation of the other procedures, the results may be quite different than when mediation is merely the first step or is not utilized at all since it offers more opportunities to reach a voluntary agreement. The use of fact-finding as an interim technique between mediation and interest arbitration<sup>82</sup> may critically affect the other two processes. It has the potential to render mediation ineffective and, at the same time, narrow issues that ultimately go to arbitration. The number of cases that reach arbitration is influenced by the procedures that precede it. Where all three procedures are used in succession (mediation, fact-finding, and arbitration), fewer cases ultimately reach arbitration than if mediation is the only prior step to arbitration or if arbitration alone is used.<sup>83</sup> Given the fact that various jurisdictions differ enormously on the combination and configuration of procedures, it would seem to be a logical conclusion that the perfect model has yet to emerge.

Another critical factor concerns the neutral third-party utilized to implement the various dispute resolution procedures. This is a multifaceted issue and raises a number of questions. First, how many neutrals are utilized in any given procedure? Usually, mediation is handled by a single practitioner. Fact-finding and arbitration, however, may utilize either a single, neutral third party or a panel (most often with three members) to carry out the process. Statutes vary on whether this issue is by choice of the parties or mandated. When choice is permitted, the resources of the party or parties required to pay for the service will influence how many third-party neutrals can be afforded.<sup>84</sup> The impact of using a single practitioner or a panel will depend on other factors such as skill level, personalities, formality of the proceedings, and which procedure is being used. Group process theory supports the idea that if more people are involved, the dynamics of the decision-making process will change.<sup>85</sup>

Second, how are neutral third-parties chosen? In some jurisdictions

---

82. See *supra* text accompanying notes 20, 44-45 & 58-62.

83. Perez, *supra* note 12, at 223.

84. See *infra* text accompanying note 89.

85. See J. LUFT, GROUP PROCESS: AN INTRODUCTION TO GROUP DYNAMICS, (1970); J. LUFT, GROUP PROCESS TODAY: EVALUATION AND PERSPECTIVE (Milman & Goldman eds. 1974).

they may be appointed by the public employment relations board,<sup>86</sup> but in most cases the selection is done by the parties. When a panel is used, each party may choose one of the members and these individuals in turn choose the third member.

Third, what is the skill level and background of the third-party neutral? Arbitrators and mediators traditionally come from a variety of disciplines including lawyers, industrial relations personnel, government employees, professors, and people who have "grown up" in the area of labor relations.<sup>87</sup> Skill level is important because the complexity of the issues is often beyond mere labor questions and may reach into technical professional policy areas. Also, different skills are required in each of the three procedures. One of the controversial factors about med-arb is that mediation is very different from arbitration and the skills and orientation of one are not necessarily compatible with the other. The success of mediation is particularly dependent on the abilities of the neutral third-party who is an active participant in the process and not just an adjudicator.

Fourth, how is the neutral linked to the particular dispute? When the parties or the board need to select a neutral third-party, there are several options depending on which procedure is involved. If a mediator is required, states have the option of utilizing the Federal Mediation and Conciliation Service which was originally formed to serve the private sector but has been expanded to include the public sector as well. There is no charge for this service. The American Arbitration Association is a primary source of arbitrators. Some states employ their own neutral third-parties or contract with private individuals to perform the job.

If the parties have the option to agree contractually, they have the freedom to choose anyone as the neutral third-party. The source of the neutral third-party may or may not impact the success of the procedure. One potential problem with utilizing neutral third-parties who have primarily functioned in the private sector, however, is that they may have difficulty in adjusting to the unique issues that arise in the public sector.

Another factor that has an impact on whether a process is utilized and to what extent, is who will be responsible for paying the neutral third-party. In many jurisdictions mediation is provided free of charge to the parties.<sup>88</sup> Fact-finding and arbitration are more likely to have at least part of the cost assessed to the parties involved. An example of when this might affect the overall process is when the fact-finder's

---

86. In Iowa, for example, the Public Employee Relations Board (PERB) may appoint a mediator upon request and must appoint a fact-finder if the mediation fails unless the parties choose to eliminate the fact-finding step. IOWA CODE § 20.1-29 (1979).

87. Meagher, *supra* note 7, at 179.

88. Iowa and Ohio are examples.

recommendation is available to the arbitrator. Even if both parties are required to share the cost, the losing party at the fact-finding will be unlikely to want to pay the costs of arbitration since it is highly probable that the arbitrator will adopt the fact-finder's recommendation.<sup>89</sup>

Another critical factor is the statutory timetable for implementing the process. It is suggested that a shorter and more rigid timetable may produce fewer settlements.<sup>90</sup> It might be argued, however, that in order to maintain a functional and responsive process and also to provide some of the "pressure" inherent in encouraging voluntary settlement at various junctures, the timeline must be tight, while remaining realistic.

A key factor that impacts the whole process is the right to strike. Although the strike is a type of "dispute resolution technique," it has long been considered alien to the public sector. It has been argued that the political process is an adequate remedy for public employees and that a strike by public employees is not accompanied by the same economic pressure on the employer inherent in the private sector.<sup>91</sup> However, as public sector collective bargaining has grown in the past twenty years, the attitudes about public employee strikes have started to change and a few states have chosen to recognize a qualified right to strike. In those jurisdictions that permit strikes,<sup>92</sup> the right is still almost universally withheld from essential public safety employees. In most jurisdictions, mediation, fact-finding, and interest arbitration are considered strike substitutes. Some of the variations previously discussed were designed to put more "teeth" into the process so it more closely approximates the power of the strike. Binding final offer arbitration is the best example.

In those jurisdictions that permit a qualified right to strike, the parties may perceive a strike as creating substantial costs, some of which are difficult to measure or accurately predict. Public employers, probably more than employees, are pressured to successfully utilize dispute resolution procedures in an effort to avoid the costs of a strike, much the same as in the private sector. Instead of loss of profits, however, the public sector costs are more likely to be of a political nature.<sup>93</sup> In some states where striking is permitted, there is no binding dispute resolution procedure available.<sup>94</sup> This exacerbates the employer's risk even more.

89. J. GRODIN, D. WOLLETT & R. ALLEYNE, *supra* note 34; at 280.

90. Sepowitz, *supra* note 24, at 179.

91. Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 949 (1969).

92. States allowing at least some employees to strike include Alaska, California, Hawaii, Illinois, Michigan, Montana, Ohio, Oregon, Pennsylvania, and Vermont. 2 PUB. EMPLOYEE BARGAINING REP. (CCH) 6500.

93. Feuille, *supra* note 77, at 4.

94. California, Hawaii, and Montana. 1 PUB. EMPLOYEE BARGAINING REP. (CCH) 4000.

V THE OHIO COLLECTIVE BARGAINING  
LAW FOR PUBLIC EMPLOYEES:<sup>95</sup>  
A CASE STUDY

Ohio has one of the newer collective bargaining statutes and provides a good case study for examining how the combination and configuration dispute resolution procedures, and a variety of extrinsic factors, interact to impact each individual technique as well as the process as a whole. A radically new approach to public sector collective bargaining in Ohio began on April 1, 1984. Prior to that time, the only existing state legislation relating to public employees prevented public employee strikes.<sup>96</sup> In 1970, Ohio tried to implement legislative change in this area, but failed in three successive attempts.<sup>97</sup> The fourth attempt in 1983 was successful and Ohio became the thirty-ninth state to implement public sector collective bargaining with the enactment of Senate Bill 133, effective April 1, 1984.<sup>98</sup> The legislation was a response to the accelerating public employee collective bargaining activity including memorandums of understanding between employers and employee organizations that bore a remarkable resemblance to labor contracts.<sup>99</sup> Another concern was the increasing use of illegal strikes, particularly among teachers.<sup>100</sup> The dispute resolution procedures provided by the Ohio statute apply either in the case of initial negotiations when a union is first recognized or negotiations triggered by the termination or request for modification of an existing collective bargaining agreement.<sup>101</sup>

Before discussing the statutorily mandated process, it is important to note that Ohio has incorporated a mechanism to bypass the statutory procedures if the parties mutually agree in writing to a voluntary settlement procedure.<sup>102</sup> In the first two years, this feature proved to be

---

95. OHIO REV. CODE ANN. § 4117 (Page Supp. 1983).

96. Ohio State Employment Relations Board, Annual Report 2 (April, 1984 - March, 1985).

97. *Id.*

98. *Id.*

99. J. LEWIS & S. SPIRN, OHIO COLLECTIVE BARGAINING LAW 3 (1983).

100. Note, *Collective Bargaining in Ohio's Public Sector: The Blueprint of Senate Bill 222 for Constructive Labor Relations*, 7 CAP. U. L. REV. 295 (1977).

101. The Ohio statute discusses its dispute resolution procedures in § 4117.14 of the Ohio Revised Code Annotated (Page Supp. 1983). The passage of the statute has resulted in a substantial number of newly certified bargaining representatives for Ohio's public employees. According to the Ohio State Employment Relations Board's Annual Report for April, 1985 - December, 1985, as a result of 294 separate elections, state employees chose bargaining representatives in 225 of the elections. Another 267 were certified through voluntary recognition. The process of negotiating the initial bargaining contracts is proceeding at the writing of this Article.

102. *Id.* at § 4117.14(C)(1). The statute lists a non-exclusive list of alternatives including conventional arbitration of all unsettled issues, arbitration confined to a choice between the last offer of each party as a single package, arbitration confined to a choice of the



quite popular. Approximately fifty percent of the notices to negotiate filed with State Employment Relations Board (SERB) have opted for a mutually agreeable dispute resolution procedure.<sup>103</sup> The statute provides a non-exhaustive list of potential techniques, but statistics are unavailable as to what techniques have been utilized. If the parties are unable to agree on a procedure within forty-five days of the expiration of a collective bargaining agreement, the statutory procedure becomes effective.<sup>104</sup> The statute also permits the parties, at any time during the process, to submit the dispute to a mutually acceptable dispute settlement procedure.<sup>105</sup>

The Ohio statute incorporates all three of the primary dispute resolution techniques, mediation, fact-finding, and binding interest arbitration, which the legislature has labeled as "conciliation." Mediation, as provided for in the statute, is both a first step in the process and an ongoing part of the process. SERB is empowered to appoint a mediator either at impasse or forty-five days prior to the expiration of an existing collective bargaining agreement.<sup>106</sup> There are roughly two weeks for mediation to be commenced prior to the next step in the process. Mediation is then available at every step of the process, conducted either by SERB or by the neutral third-party in control of the current procedure.<sup>107</sup>

If the parties remain at impasse within thirty-one days of the expiration of the agreement, SERB must immediately appoint a fact-finding panel of one to three members selected by the parties from a list of qualified neutrals maintained by SERB.<sup>108</sup> Within sixteen days, the fact-finding panel must hold a hearing and submit its recommendations on unresolved issues to the parties and SERB unless the parties mutually agree to an extension.<sup>109</sup> The panel's recommendation will become binding within seven days unless either the legislature or the public employee organization rejects the recommendations by a three-fifths vote of their respective memberships. If either one rejects the recommendations, the findings are publicized.<sup>110</sup> Functionally, this requirement makes overturning the fact-finder's recommendation extremely difficult. This is the

---

last offer of each party to the agreement on each issue submitted, any one of the three previously listed procedures and including the fact-finder's recommendation at one of the arbitrator's choices, settlement by a citizen's conciliation council, or any other dispute settlement procedure mutually agreed to by the parties.

103. Ohio State Employment Relations Board, Annual Report 15 (April, 1984 - March, 1985).

104. OHIO REV. CODE ANN. § 4117.14(C) (Page Supp. 1983).

105. *Id.* at § 4117.14(E).

106. *Id.* at § 4117.14(C)(2).

107. *Id.* at § 4117.14(C)(4)(F), (D)(2), & (G)(1).

108. *Id.* at § 4117.14(C)(3).

109. *Id.* at § 4117.14(C)(5).

110. *Id.* at § 4117.14(C)(6).

final step in the process for all but essential public safety employees, unless they are able to overcome the three-fifths vote obstacle. If they are able to meet the three-fifths vote requirement, the contract expires, they have given ten days notice, and those public employees not considered essential may then strike.<sup>111</sup>

The three-fifths vote required to prevent a binding fact-finder's recommendation may have an ironic result, if the goal of the process is to give the employees additional bargaining power. The number of votes required in the legislature to achieve a three-fifths vote is much smaller than the number of votes required for a large employee organization. As a result, this clause tends to favor the employer rather than the employees.<sup>112</sup> A factor that may mitigate this result, but has yet to be determined, is whether the legislature can be responsive to the seven day time frame to which they are bound.

For essential public safety employees who are denied the right to strike under the statute,<sup>113</sup> there is an additional step in the process. These employees are required to proceed to a final offer settlement (which the statute terms "conciliation") by a single conciliator. This occurs if the parties are unable to reach agreement within seven days of the publishing of the fact-finder's recommendations or if the contract expires.<sup>114</sup>

There are two unusual features in Ohio's final offer settlement procedure. First, the resolution is done on an issue-by-issue basis rather than a "total package" approach.<sup>115</sup> The fact-finder's recommendation is available to the conciliator but may not be one of the options. The conciliator's choice between the parties' final offers is based on six criteria enumerated in the statute.<sup>116</sup> In the Ohio design, a final submitted

---

111. *Id.* at § 4117.14(D)(2).

112. Perez, *supra* note 12, at 216.

113. OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1983). The following employees are not permitted to strike under the Ohio statute: members of a police or fire department, members of the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special policemen or policewomen appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities.

114. *Id.* at § 4117.14(D)(1).

115. *Id.* at § 4117.14(G)(7).

116. *Id.* at § 4117.14(G)(7)(A)-(F). Factors to be considered by the conciliator when resolving the dispute between the parties on an "issue-by-issue" basis are as follows:

(A) Past collectively bargained agreements, if any, between the parties;

(B) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

offer can be different from the last offer presented during fact-finding. The second unusual feature is that the conciliator may attempt mediation at any time. This configuration is essentially med-arb.<sup>117</sup> One potential problem is that the conciliator may not have the skill to both mediate and arbitrate. The conciliator has thirty days to conduct a hearing after which a written decision is issued that is then binding and enforceable.<sup>118</sup>

Statistics for the utilization of the dispute resolution procedures in the Ohio statute are currently limited to the first twenty-one months of implementation ending December 31, 1985.<sup>119</sup> In those twenty-one months, of the 2,145 notices to negotiate received by SERB, almost half of those settled involved use of the statutory impasse procedures.<sup>120</sup> During that time, 937 mediators, 508 fact-finders, and 52 conciliators were appointed.<sup>121</sup> Close to seventy-five percent of all negotiations were completed with either no assistance or mediation alone.<sup>122</sup> Of those parties utilizing fact-finding, nineteen percent were settled with the fact-finder mediating.<sup>123</sup> Where the fact-finding resulted in a recommendation, forty-six percent were accepted by the parties.<sup>124</sup> Unions rejected only half the number of recommendations that employers rejected because of the burden the three-fifths vote places upon a union with a large membership.<sup>125</sup> To date, Ohio has experienced an average of seven strikes per year.<sup>126</sup> It is impossible to draw any significant conclusions from these statistics, particularly since there is little information on those who opted for alternative procedures, what the procedures are, and whether they have been utilized.

Several of the extrinsic factors discussed above are relevant to the Ohio statute as it is being implemented. At present, the Federal Me-

(C) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(D) The lawful authority of the public employer;

(E) The stipulations of the parties;

(F) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in other impasse resolution procedures in the public service or in private employment.

117. See *supra* text accompanying notes 58-62.

118. OHIO REV. CODE ANN. § 4117.14(G)(2) & (10) (Page Supp. 1983).

119. Statistics are available in the following three documents: Ohio State Employment Relations Board, Annual Report (Apr., 1984 - Mar., 1985); Ohio State Employment Relations Board, Annual Report (Apr., 1985 - Dec., 1985); The Report of the Public Employment Advisory and Counseling Effort Commission to the General Assembly and Governor of Ohio (Mar. 1, 1986) [hereinafter P.E.A.C.E. Comm's].

120. P.E.A.C.E. Comm's, *supra* note 119, at 44.

121. *Id.*

122. *Id.* at 47.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 61.

diation and Conciliation Service provides SERB with all of its mediators.<sup>127</sup> There is discussion of eventually having full-time, paid mediators employed by SERB, but that appears to be a distant goal.<sup>128</sup> The fact-finders and conciliators are selected and appointed from a roster of individuals who submit resumes to SERB, which then decides if their qualifications are acceptable.<sup>129</sup>

Another factor discussed above concerns who is responsible for paying for the procedures.<sup>130</sup> Ohio's statute has a graduated system which requires the parties to pay more at each step. Mediation is free.<sup>131</sup> The cost of fact-finding is divided so that the State pays for half and each of the parties pay one-fourth of the total cost.<sup>132</sup> The cost of conciliation is borne equally by the parties.<sup>133</sup> This system makes it progressively more expensive and encourages parties to settle.

One of the most controversial issues related to the Ohio statute is the timeline. The timeline is both short and rigid, which, as discussed earlier,<sup>134</sup> may actually inhibit voluntary settlement. The annual report for the first year indicated that SERB was able to adhere fairly closely to the designated timelines.<sup>135</sup> However, it is too early to determine if all the parties involved will be able to do as well and whether the timeline will be a significant factor that impacts the effectiveness of the procedures. There is some indication that mediation prior to fact-finding is not being utilized. That may be due to the fact that the parties are relying on the remainder of the process as much as the timeline.

Ohio is one of the few states that has incorporated a right to strike for non-essential employees in its statute. It may be too soon to assess the impact of this issue on the dispute resolution technique and it also may be too interrelated with other factors to isolate its impact.

Ohio's Public Employee Collective Bargaining Law<sup>136</sup> is approaching its third birthday. Although it has been effective for almost three years, public sector collective bargaining in Ohio is still in its infancy and experiencing growing pains almost daily. Unfortunately, the confusion of "getting started" has left little time and effort for data collection, and there is little statistical data available to date. Based on interviews

---

127. *Id.* at 21.

128. Interview with G. Thomas Worley, Bureau of Mediation Administrator, Ohio State Employment Relations Board, in Columbus, Ohio (December 18, 1985).

129. *Id.*

130. *See supra* text accompanying note 89.

131. OHIO REV. CODE ANN. § 4117.14(C)(2) (Page Supp. 1983).

132. *Id.* at § 4117.14(C)(5).

133. *Id.* at § 4117.14(G)(12).

134. *See supra* text accompanying note 90.

135. Ohio State Employment Relations Board, *supra* note 103, at 14.

136. OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1983).

with selected key participants in the process,<sup>137</sup> there appears to be some consensus among the primary players about what is wrong with the current configuration, as well as some disagreement about how the problems should be solved.

In addition, the Ohio legislature was aware that the new Public Employee Collective Bargaining Law<sup>138</sup> was not only new to Ohio, but unique in several respects. In order to evaluate the newly created statutory framework, the legislature established, as part of the law, the Public Employment Advisory and Counseling Effort Commission, better known as the P.E.A.C.E. Commission.<sup>139</sup> The Commission was created for a period of two years to assist in educating public employers, public employees, and employee organizations about the law, and at the same time, to obtain their comments for purposes of evaluation in order to provide the legislature with a report by March 1, 1986. The P.E.A.C.E. Commission has collected input from the various players involved and synthesized the recommendations they received into the legislative report.

Two major areas seem to be most problematic. First, everyone agrees that the timeline for the procedures is extremely unrealistic and artificial at almost every point in the process.<sup>140</sup> The concern starts with the allowance of only fifteen days of negotiation when an existing agreement is expiring and forty-five days for an initial contract prior to the statutory dispute resolution process taking effect. The parties feel that this time frame completely ignores the realities of the negotiation process, which can be extremely time consuming, and consequently, does not promote the goal of voluntary settlement. If the parties have not chosen their own dispute resolution procedure, once the statutory process becomes effective there are only two weeks allotted to mediation prior to fact-finding. Given the fact that parties may be geographically distant from each other and that negotiating a specific labor contract may not be the only responsibility of either the parties or the mediator, two weeks may only allow the parties to meet once or twice at best. Once fact-finding begins, the parties have the opportunity to agree to extend the time frame for fact-finding. According to G. Thomas Worley, Bureau of Mediation Administrator for SERB, the parties take advantage of

---

137. Interviews with G. Thomas Worley, Bureau of Mediation Administrator, Ohio State Employment Relations Board, in Columbus, Ohio (December 18, 1985); John Alexander, Assistant Attorney General assigned to the Ohio Office of Collective Bargaining, in Columbus, Ohio (February 11, 1986); John Looman, Executive Director, P.E.A.C.E. Comm's, in Columbus, Ohio (February 12, 1986); and David Laurensin, Legislative Specialist, AFSCME, in Columbus, Ohio (February 12, 1986).

138. OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1983).

139. PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT, Section 7, PUB. EMPLOYEE REP. (Ohio Edition) (April, 1984).

140. See P.E.A.C.E. Comm's, *supra* note 119, at 48.

this option and file for extensions almost 90% of the time.<sup>141</sup> The entire membership of the P.E.A.C.E. Commission agreed that the timeline was unrealistic and should be extended both in total length and between procedures.<sup>142</sup>

The second major concern relates to the configuration of the procedures, particularly mediation and fact-finding. All of the parties agree that mediation as it is now structured is ineffective, primarily due to the limited time frame, but also due to the lack of binding authority of the mediator. The only suggested advantage to mediation as it is now structured is that it may help educate those parties who are inexperienced in collective bargaining, as many participants still are in Ohio. Although the parties dislike mediation in the current configuration, all parties interviewed felt that mediation was important to the process and could be more effective in a different configuration — either during or after fact-finding.

By contrast, there was little concern expressed about conciliation, which is Ohio's version of final-offer arbitration. It was suggested that conciliation may be redundant following fact-finding. Another concern was that "issue-by-issue" final offer arbitration is not as effective as "total package" because there is no prioritization of issues. Neither of these concerns were sufficiently important that they were reflected in possible statutory changes.

The P.E.A.C.E. Commission has not made a specific recommendation regarding the configuration, but they have offered three possible configurations as alternatives for the Governor and the General Assembly to consider.<sup>143</sup> The first alternative is to revise the current system completely and merely provide the dispute resolution procedures as a service that the parties may elect to use, but are not required to use. The second alternative would extend the current time frame in all areas and reverse the order of mediation and fact-finding. The third alternative is a combination of the first two. The legislature has the option of doing nothing with the report, but the hope is that the report will provide the impetus for needed revisions. Of the parties interviewed, all were waiting for the legislature's reaction before considering sponsoring legislation on their own.

## VI. CONCLUSION

As states such as Ohio continue to evolve the collective bargaining process in the public sector, the mechanisms for dispute resolution will

---

141. See Worley *supra* note 128.

142. See P.E.A.C.E. Comm's, *supra* note 119, at 48.

143. *Id.* at Appendices C, D, and E.

## ***PUBLIC SECTOR COLLECTIVE BARGAINING***

also evolve. The unique circumstances that are presented in the public sector, that have been previously unknown in private sector collective bargaining, continue to provide the potential for a myriad of new approaches to dispute resolution. Although common terms are utilized to describe dispute resolution techniques such as mediation, fact-finding, and arbitration, in reality, the variations within techniques, as well as the variety of potential configurations, may require new labels in the future in light of the different results they generate. Those commentators that use words like "frontier" and "laboratory" to describe the state of public sector collective bargaining in the United States have definitely captured the essence of the evolution and experimentation that prevails.

*Gay M. Gilbert*

